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# Reflections on the Twentieth Anniversary of the Canadian Charter of Rights and Freedoms: a Symposium

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Introduction

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# REFLECTIONS ON THE TWENTIETH ANNIVERSARY OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*: A SYMPOSIUM<sup>©</sup>

On 16 April 1982 Canada formally amended its written Constitution by adding the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> which “explicitly authorized judicial review and the power of all courts to declare offending statutes void.”<sup>2</sup> This event was a turning point for the Canadian legal and political system and culture, prompting much speculation and a great deal of debate about what the effect of the *Charter* would, and should, be. Over the past two decades, the Osgoode Hall Law Journal has provided a forum for scholarly discussion and analysis of some of the crucial questions arising out of this debate.

The appropriate relationship between the courts and legislatures in a liberal democracy has been a recurring theme in the debate surrounding the *Charter* that has been taken up in the pages of the Osgoode Hall Law Journal. The normative question about what the relationship between these two institutions should be<sup>3</sup> and the empirical question of the actual impact of the *Charter* on the relations between courts and legislatures have been considered.<sup>4</sup> Political scientists and legal academics have attempted to answer these questions, promoting a dialogue between the disciplines in the Osgoode Hall Law Journal.

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> F.L. Morton, Peter H. Russell & Michael J. Withey, “The Supreme Court’s First One Hundred Charter of Rights Decisions: A Statistical Analysis” (1992) 30 Osgoode Hall L.J. 1 at 2.

<sup>3</sup> Brian Slattery, “A Theory of the *Charter*” (1997) 25 Osgoode Hall L.J. 701.

<sup>4</sup> Morton, Russell & Withey, *supra* note 2; Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997) 35 Osgoode Hall L.J. 75; Christopher P. Manfredi & James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell,” (1999) 37 Osgoode Hall L.J. 513; Peter W. Hogg & Allison A. Thornton, “Reply to Six Degrees of Dialogue” (1999) 37 Osgoode Hall L.J. 529; James B. Kelly, “The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997” (1999) 37 Osgoode Hall L.J. 625; “Impact of the *Charter* on Public Policy: A Symposium” (1992) 30 Osgoode Hall L.J. 499-770; Carl Baar & Ellen Baar, “Diagnostic Adjudication in Appellate Courts: The Supreme Court of Canada and the *Charter of Rights*” (1989) 27 Osgoode Hall L.J. 1.

The entrenchment of the *Charter* also triggered a great deal of jurisprudential debate about how the courts should interpret and apply fundamental rights and freedoms. The Osgoode Hall Law Journal has published articles that have advocated and assessed interpretive approaches<sup>5</sup> and evaluated *Charter* decisions by courts, especially the Supreme Court of Canada, in particular areas.<sup>6</sup> Doctrinal exegesis has often

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<sup>5</sup> Peter W. Hogg, "The *Charter of Rights* and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87; Leon E. Trakman, William Cole-Hamilton & Sean Gatten, "*R. v. Oakes* 1986-1996: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 84; Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123; Richard Moon, "The Scope of Freedom of Expression" (1985) 23 Osgoode Hall L.J. 331; Richard Moon, "Discrimination and Its Justification: Coping With Equality Rights Under the *Charter*" (1988) 26 Osgoode Hall L.J. 673; Richard F. Devlin, "Ventriloquism and the Verbal Icon: A Comment on Professor Hogg's 'The *Charter* and American Theories of Interpretation'" (1988) 26 Osgoode Hall L.J. 1; Peter W. Hogg, "Interpreting the *Charter of Rights*: Generosity and Justification" (1990) 28 Osgoode Hall L.J. 817; W.J. Waluchow, "*Charter* Challenges: A Test Case For Theories of Law" (1991) 29 Osgoode Hall L.J. 183; Marc Gold, "The Rhetorical of Rights: The Supreme Court and the *Charter*" (1987) 25 Osgoode Hall L.J. 375; Paul Horwitz, "Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law" (2000) 38 Osgoode Hall L.J. 101; Noel Lyon, "An Essay On Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95; Andr  e Lajoie *et al.*, "Les Repr  sentations de «Soci  t   Libre et D  mocratique»    la Cour Dickson: La Rh  torique dans le Discours Judiciaire Canadien" (1994) 32 Osgoode Hall L.J. 295.

<sup>6</sup> Jamie Cameron, "The Past, Present and Future of Expressive Freedom under the *Charter*" (1997) 35 Osgoode Hall L.J. 1; Kent McNeil, "Aboriginal Governments and the Canadian *Charter of Rights and Freedoms*" (1996) 34 Osgoode Hall L.J. 61; Daniela Bassan, "The Canadian *Charter* and Public International Law: Redefining the State's Power to Deport Aliens" (1996) 34 Osgoode Hall L.J. 583; Hamish Stewart, "Spousal Incompetency and the *Charter*" (1996) 34 Osgoode Hall L.J. 411; Isabel Grant, "Second Chances: Bill C-71 and the *Charter*" (1995) 33 Osgoode Hall L.J. 379; June Ross, "Standing in *Charter* Declaratory Actions" (1995) 33 Osgoode Hall L.J. 151; Sidney R. Peck, "An Analytic Framework for the Application of the Canadian *Charter of Rights and Freedoms*" (1987) 25 Osgoode Hall L.J. 1; Annalise Acorn, "Gender Discrimination in the Common Law of Domicile and the Application of the Canadian *Charter of Rights and Freedoms*" (1991) 29 Osgoode Hall L.J. 419; Robert Harvie & Hamar Foster, "Ties That Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the *Charter*" (1990) 28 Osgoode Hall L.J. 729; David J. Corry, "Military Law Under the *Charter*" (1986) 24 Osgoode Hall L.J. 67; J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall L.J. 51; Martha Jackman, "Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the *Charter*" (1996) 34 Osgoode Hall L.J. 661; David M. Beatty, "ShopTalk: Conversations about the Constitutionality of Our Labour Law" (1989) 27 Osgoode Hall L.J. 381; Robert J. Sharpe, "The Constitutional Legacy of Chief Justice Brian Dickson" (2000) 38 Osgoode Hall L.J. 189; Pamela A. Chapman, "The Politics of Judging: Section 1 of the *Charter of Rights and Freedoms*" (1986) 24 Osgoode Hall L.J. 867; David M. Beatty, "Labouring Outside the *Charter*" (1991) 29 Osgoode Hall L.J. 839; Isabel Grant, "Mental Health Law and the Courts" (1991) 29 Osgoode Hall L.J. 747; Russel P. Cohen, "Fundamental (In) Justice: The Deportation of Long-Term Residents From Canada" (1994) 32 Osgoode Hall L.J. 457.

been combined with a realist approach to show how specific interests have fared when seeking to use the *Charter* to enforce a right.<sup>7</sup>

The twentieth anniversary of the *Charter* provides an opportunity to reflect upon the *Charter's* impact on the Canadian legal and political system and culture. To this end, the Board of Editors commissioned a series of articles on this topic that are designed to illustrate both the value of a socio-legal approach to understanding law and the strength of a general law journal. The goal of this symposium is not to provide an exhaustive analysis of the *Charter's* impact but rather to offer a range of articles that taken together emphasize the need for pluralism in methodology and perspective in order to develop a comprehensive understanding of the *Charter's* influence.

The articles are arranged alphabetically by author's surname in the Journal. However, this introduction discusses the articles in relation to their methodology, moving from general to more specific.

The last article in the symposium places the *Charter* in the broader context of economic globalization and Canadian constitutional law.<sup>8</sup> David Schneiderman employs the concept of constitutional *bricolage* to examine the role that political culture plays in moulding the interpretive strategies of courts. *Bricolage* means drawing from the stock of tools at hand to interpret constitutional rights. Although it is often invoked to emphasize judicial autonomy in selecting a specific tool, Schneiderman stresses the constraints that the existing tools and accepted practices place upon how judges exercise their discretion. He argues that Canada's proximity to the United States and the hegemony of neoliberalism explain the role that the "market"—premised on the free and mutual exchange of value between buyers and sellers—increasingly plays in constitutional interpretation.<sup>9</sup> He discusses three fields—commercial speech under the *Charter*, federalism, and Aboriginal rights—in which the Supreme Court of Canada has adopted a "buyer-seller" model of constitutional interpretation. He cautions that the judiciary is unlikely to preserve a distinctive Canadian constitutional law

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<sup>7</sup> Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to *Charter* Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485; H.J. Glasbeek, "Contempt for Workers" (1990) 28 Osgoode Hall L.J. 1.

<sup>8</sup> David Schneiderman, "Exchanging Constitutions: Constitutional *Bricolage* in Canada" (2002) 40 Osgoode Hall L.J. 401.

<sup>9</sup> *Ibid.* at 403.

and culture in a “world of increasing constitutional convergence and homogeneity.”<sup>10</sup>

Richard Moon’s article shifts from the level of comparative constitutional law and political economy to assess the Supreme Court of Canada’s approach to *Charter* interpretation.<sup>11</sup> He uses the Supreme Court of Canada’s freedom of expression decisions to illustrate why the two-step adjudicative approach articulated in *R. v. Oakes*<sup>12</sup> has not fulfilled its promise to provide a principled approach to constitutional adjudication. According to Moon, this approach assumes a clear distinction between a right and conflicting interests and conceptualizes rights as protecting aspects of individual liberty from state interference. However, freedom of expression is a right that is social and relational: “it protects the individual from state interference with her or his liberty or freedom to communicate with others—to engage with others and participate in community life.”<sup>13</sup> Thus the task is not the principled one of balancing the distinct interests of separate individuals but instead involves making a contextual judgment about the relative harm and value of a particular expressive activity. Given the nature of this endeavour, Moon suggests that the courts should adopt a deferential stance to legislative judgments about restrictions on freedom of expression.

Several of the articles combine doctrinal analysis with a realist approach in order to consider how specific types of *Charter* claims have fared. Brenda Cossman examines decisions by the Supreme Court of Canada in which gay men and lesbians have asserted *Charter* or human rights; Diana Majury explores the extent to which women have been able to use the equality rights guaranteed in the *Charter* to achieve substantive equality for differently situated women; and Dianne Pothier evaluates the extent to which *Charter* guarantees have protected workers’ collective rights. These articles illustrate the capacity of judicial interpretation to accommodate minority and collective rights.

In her examination of the legacy of *Charter* challenges for gay men and lesbians, Cossman analyzes the doctrinal developments, the nature of the legal strategies, and broader political implications, including the

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<sup>10</sup> *Ibid.* at 424.

<sup>11</sup> Richard Moon, “Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights” (2002) 40 Osgoode Hall L.J. 337.

<sup>12</sup> [1986] 1 S.C.R. 103.

<sup>13</sup> Moon, *supra* note 11 at 341.

mobilization of social movements, of using the *Charter*.<sup>14</sup> She argues that the decisions have helped to constitute a new legal subject and that the decisions have had contradictory implications for lesbians and gay men. At the same time that certain forms of same-sex relationships are being recognized as legitimate for many legal purposes, others are not. According to Cossman:

[t]he respectability of the new legal subjects requires this careful policing of the borders of recognition. The new legal subject is not the erotically charged subject of the gay bars and bath houses who remains a sexual outlaw. The inclusion of gay and lesbian subjects into law is being regulated at its margins to ensure that the 'others'—the sexually promiscuous, sexually public, and sexually non-monogamous—remain outlaws."<sup>15</sup>

Majury begins her examination of women's attempts to use the *Charter*'s equality rights by surveying the criticisms that have been lodged against using the *Charter* to further progressive political struggles.<sup>16</sup> Adopting a feminist and pragmatic approach to her assessment of the *Charter*, she concludes that the legacy of equality litigation for women has been equivocal. Although the *Charter* has enabled feminists to raise important equality arguments about sexual violence against women and reproductive freedom, equality arguments have been less successful in addressing socio-economic inequalities. For Majury, "[t]he *Charter* presents the opportunity for equality and social justice advocates to critique and to dream at the same time and to pursue those dreams of concrete social change under a document that was not intended to accommodate fundamental social change."<sup>17</sup>

According to Pothier, "[i]n the first seventeen years of the *Charter* and labour law in the Supreme Court of Canada, there was a lot of ink spilled simply to stand still."<sup>18</sup> What initially distinguished organized labour's attempts to use the *Charter* from that of other social movements was its overwhelming lack of success. Restrictions on picketing and legislative rollbacks on collective bargaining and on the right to strike

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<sup>14</sup> Brenda Cossman, "Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*" (2002) 40 Osgoode Hall L.J. 223.

<sup>15</sup> *Ibid.* at 248.

<sup>16</sup> Diana Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall L.J. 297.

<sup>17</sup> *Ibid.* at 336.

<sup>18</sup> Dianne Pothier, "Twenty Years of Labour Law and the *Charter*" (2002) 40 Osgoode Hall L.J. 369.

repeatedly were upheld by the Supreme Court of Canada, which has continued to rule that the freedom of association protected in the *Charter* protects neither collective bargaining nor the right to strike. It was only in 1999 that the Supreme Court of Canada issued a decision that was favourable to organized labour when it gave constitutional protection to consumer leafleting in the context of a labour dispute.<sup>19</sup> In subsequent decisions, the Court has interpreted freedom of association as including a positive obligation on the government to provide legislative protection for vulnerable workers who would otherwise be unable to exercise their right to associate freely<sup>20</sup> and the freedom of expression to modify the common law doctrine that all secondary picketing is illegal per se.<sup>21</sup> But, as Pothier notes, even these recent decisions, although they signal a shift in *Charter* jurisprudence, only tinker at the margins of the existing legal limits on workers' collective action. She concludes that "[p]olitics still explains much more about labour law than constitutional law does."<sup>22</sup>

Lise Gotell's article in the symposium examines the relationship between the courts and the legislature under the *Charter* by presenting a case study of how lower courts have interpreted the Supreme Court of Canada's decision in *R. v. Mills*,<sup>23</sup> which upheld the amendments to the *Criminal Code*<sup>24</sup> restricting access by defendants in sexual assault trials to the private records of complainants. These amendments were introduced after the Supreme Court of Canada's 1995 decision in *R. v. O'Connor*,<sup>25</sup> which gave defendant's access to such records. In exploring the current state of the Canadian law on production and disclosure in the context of sexual assault trials, Gotell's article goes beyond a narrow doctrinal focus on the Supreme Court's decisions and a formal analysis of the legislative sequella to a prominent decision to consider how lower courts interpret the

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<sup>19</sup> *United Food and Commercial Workers, Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083.

<sup>20</sup> *Dunmore v. Ontario (A.G.)*, 2001 SCC 94.

<sup>21</sup> *Pepsi-Cola Canada Beverages (West) Ltd. v. Retail, Wholesale and Department Store Union, Local 558*, 2002 SCC 8.

<sup>22</sup> Pothier, *supra* note 18 at 400.

<sup>23</sup> [1999] 3 S.C.R. 688 [*Mills*].

<sup>24</sup> *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30.

<sup>25</sup> [1995] 4 S.C.R. 411.

legislation.<sup>26</sup> She concludes that although lower courts are less willing after *Mills* to order production of complainants private records, the basis for these decisions are problematic. The courts have adopted a narrow interpretation of section 278 of the *Criminal Code* that emphasizes the privacy rights of individual women rather than sexual subordination and sexual coercion. Gotell brings a sophisticated theoretical framework to a rich case study in order to illustrate how the *Charter* has influenced discourses on sexual violence in Canada.

The symposium on the *Charter* is followed by a commentary by L. Yves Fortier, Canada's former Ambassador and Permanent Representative to the United Nations and President of the United Nation's Security Council, on the impact of the events of 11 September 2001 on Canada's and Quebec's sovereignty.<sup>27</sup> This commentary, which is a revised version of the fourth Pierre Genest Memorial Lecture, serves as an important reminder that events well outside the purview of constitutional law may have a much more dramatic impact on Canadian legal and political culture than Supreme Court of Canada decisions and constitutional documents.

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<sup>26</sup> Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law" (2002) 40 Osgoode Hall L.J. 251.

<sup>27</sup> L. Yves Fortier, "A Mature Exercise of Sovereignty" (2002) 40 Osgoode Hall L.J. 425.



